none is maintainble by the *lex fori*,[12] seems preferable on principle.[13] This conclusion is fortified by the fact that the taxing State has an exclusive right to summary remedies for the collection of taxes, while the foreign State is confined to the slower process provided for the enforcement of debts owing to individuals.[14]

If these premises be sound we are led to a consideration of the principles of comity and their applicability here. Clearly the New York court is not absolutely bound by any rule of comity to enforce the tax laws of another State, since it belongs exclusively to each sovereignty to determine for itself to what extent it shall exercise comity.[15] But the very enunciation of this principle shows that within the wide latitude attendant upon its operation the courts can easily and consistently adopt a broad and liberal policy adapted to modern conditions. An historical examination of the subject shows that the reluctance entertained by one country to enforce similar laws of another country was originally manifested at a time when intermittent actual war and constant commercial war was the prevailing condition.[16] Certainly this reason for the rule fails totally when the question arises among sister States of this nation. A further objection may be made that the sustainment of this action might result in double taxation. If this be proved to be actually the fact in a given case, then indeed is the time for the court to refuse to enforce a foreign tax law. But if such is not the case, then what possible objection remains to the exercise of comity?[17] It is submitted that if all the State courts took the view herein advanced, in no sense would they be neglecting their duty to their own citizens or discriminating against them, while on the other hand the indirect beneficial result is obvious.[18]

ELECTION OF REMEDIES.—In order to do justice, the law often allows an injured party to make his choice between two versions of the same transaction, a privilege which, though often spoken of as an election of remedies, is in reality an election of the rights which lie back of all actions.[1] So, at early common law when a tortious pos-

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[12]Herrick *v.* Minneapolis and St. Louis R. R. Co. (1883) 31 Minn. 11; Northern Pacific R. R. *v.* Babcock (1894) 154 U. S. 190.

[13]The law in this country has passed through three distinct stages: first, the narrow Massachusetts doctrine; see Richardson *v.* New York Central Ry. Co. (1867) 98 Mass. 85; Davis *v.* New York and New England Ry. Co. (1887) 143 Mass. 301; second, the somewhat less narrow New York doctrine, see note 11 *supra;* third, the liberal and preferable Western doctrine, see note 12 *supra.*

[14]2 Cooley, Taxation, 828.

[15]Marshall *v.* Sherman *supra.*

[16]For instance, the relations between England and Spain down to the Napoleonic period.

[17]Note the language of the court in Howarth *v.* Angle (1900) 162 N. Y. 179, 192.

[18]Extra-judicial recognition of foreign taxes is becoming more and more frequent. For instance, in administrative proceedings on the settlement of an estate in State A, inquiry is made as to the extent to which the estate is taxed in State B, and the tax in A is cut down correspondingly. And see Matter of Cooley (1906) 186 N. Y. 220.

[1]Butler *v.* Hildreth (Mass. 1842) 5 Met. 49.

session carried with it a title by wrong in the case of chattels as well as in the case of disseisin of land,[2] the aggrieved person had his choice of asserting that title was in the taker, and bringing trespass for the value, or that title was in himself, and bringing replevin for the thing,[3] and this election was not based upon any legal fiction; the waiver of the original owner's right to title made the taker's title perfect, and the former could no more claim title afterwards than one having a right of entry for breach of condition subsequent could enter after once waiving the right. But an action of account would not bar an action of debt because both rested upon the same fundamental right.[4] In a word, the doctrine of election of remedies is nothing more than that a plaintiff having once chosen his right, can only pursue those remedies which that right will support. Thus, where a contract is tainted with fraud it may be rescinded, which makes it void *ab initio*,[5] or affirmed, which makes it valid in every respect,[6] and once having become either void or absolute it cannot be changed.[7]

Whether an election has been made is a question of fact, and upon strict principle any expression, either by words or conduct or both, showing that a choice has been made should be final, but the courts are slow to hold a man to a hasty selection so long as the opposite party is not prejudiced.[8] Thus it has often been declared that mere words are not sufficient, and accordingly a demand of payment under a contract has been held not to preclude a subsequent right to rescind,[9] nor even the bringing of a suit where the plaintiff was ignorant of some of the material facts,[10] or knowing the facts was ignorant of his choice of rights.[11] But bringing a suit based upon one theory or the other with full knowledge of all the circumstances and a fair opportunity of choice, is usually deemed to be conclusive evidence of the adoption of one right, upon which the plaintiff must stand or fall.[12]

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[2]Ames, Disseisin of Chattels, 3 Harv. L. Rev. 23, 326.

[3]Y. B. 19 Hen. VI, 65, pl. 5; 6 Hen. VII, 8, pl. 4. For translation see opinion of Holmes, J. in Miller *v.* Hyde (1894) 161 Mass. 472. Bishop *v.* Montague (1600) Cro. Jac. 50.

[4]This distinction was noticed by Coke. *Vide* Co. Lit. 144-*b*; *id.* 145-*a*; *id.* 146-*a*. For discussion of these sections, see Hitchen *v.* Campbell (1772) 2 Wm. Bl. 827.

[5]Butler *v.* Hildreth *supra.*

[6]Butler *v.* Hildreth *supra.*

[7]See Ward *v.* Day (1863) 4 Best & S. 337 for a general discussion as to the effect of an election.

[8]Clough *v.* London & N. W. Ry. Co. (1871) L. R. 7 Ex. 26.

[9]Valpy *v.* Sanders (1848) 5 C. B. 887.

[10]Pratt *v.* Philbrook (1856) 41 Me. 132; Wells Fargo & Co. *v.* Robinson (1859) 13 Cal. 134.

[11]See Peters *v.* Ballister (Mass. 1826) 3 Pick. 495; but see Bulkley *v.* Morgan (1878) 46 Conn. 393; Niel *v.* Burton (1882) 49 Mich. 53. When the remedy selected does not in fact exist, such is not regarded as an election. See Marsh Bros. & Co. *v.* Bellefleur (Me. 1911) 81 Atl. 79.

[12]Butler *v.* Hildreth *supra;* Moller *v.* Tuska (1881) 87 N. Y. 166. But an election may be evidenced by other acts besides bringing suit. It is held that a party having a right to rescind must act promptly or else his failure to act will be regarded as evidence of an affirmance of the contract. Elgin *v.* Snyder (Or. 1911) 118 Pac. 280.

Under these circumstances, therefore, an action begun in assumpsit upon a contract of sale would forever bar an action in replevin or trover,[13] and *vice versa*,[14] but an action in trover would not bar an action in replevin,[15] because both would be founded upon a rescission.[16]

A tort may be committed under such circumstances that the law allows the injured party to sue either in tort or in contract, thus plainly giving the use of two remedies, and, perhaps because a quasi-contract action is brought in the same form as a true assumpsit, it has been held upon the theory of election of inconsistent rights that bringing such an action will bar a subsequent suit in tort.[17] But it is submitted that the doctrine invoked has no application to such a case, since the tort and quasi-contract action proceed upon the same right. Indeed, instead of the tort disappearing when the action of assumpsit is brought, this action could not be maintained without proof of the tort.[18] It is difficult to see how the assertion of one involves the repudiation of the other, unless the fiction of a contract, adopted solely to give redress, be used to deny a remedy.[19] A sounder view of these cases would be that there is but one right which supports several alternative but not inconsistent remedies, and accordingly the pursuit of one should not bar the other unless both have become merged in a judgment.[20]

In the recent case of *Houston Mercantile Co.* v. *Powell & King* (1911) 130 N. Y. Supp. 274, the right of a lessee to set up a counter-claim was questioned because he had previously filed a petition in equity for a rescission of the contract upon which his counter-claim was based. The court, admitting that the commencement of a suit at law based upon a rescission would constitute an election, held that such was not the effect of the filing of a suit in equity for a rescission. It seems obvious that the prosecution of a petition for rescission to decree would bar a suit upon the contract,[21] because after decree the

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[13]Butler v. Hildreth *supra;* see also Wachsmuth *v.* Sims (Tex. 1895) 32 S. W. 821.

[14]Morris *v.* Rexford (1859) 18 N. Y. 552; Kenney *v.* Kiernan (1872) 49 N. Y. 164.

[15]See Butler *v.* Hildreth *supra.* Today both trover and replevin proceed upon the assumption of title in the plaintiff.

[16]An election determines the rights of all parties concerned. Accordingly, where a suit was brought on a contract which might have been disaffirmed, the defendant was allowed to plead a set-off, which, had the plaintiff sued in trover, he could not have pleaded. Smith *v.* Hodgson (1791) 4 T. R. 211.

[17]Thompson *v.* Howard (1875) 31 Mich. 309; see note in Scott, Cases on Quasi-Contracts, 148, 151.

[18]Huffman *v.* Hughlett (Tenn. 1883) 11 Lea 549.

[19]See Keener, Quasi-Contracts, 207.

[20]Gibbs *v.* Jones (1868) 46 Ill. 319. Where one action is prosecuted to judgment the rule *nemo debet bis vexari pro eadem causa* applies, and all rights are merged. Slade's Case (1596) 4 Co. Rep. 92-*b;* Keener, Quasi-Contracts, 207. But see Miller *v.* Hyde *supra.* But to make the rule applicable the remedies must have been co-extensive. Browning *v.* Bancroft (Mass. 1844) 8 Met. 278.

[21]Bacon & Co. *v.* Moody (1903) 117 Ga. 207.

contract is gone, and there is nothing left to support an action,[22] but since a petition for rescission in itself admits that there is a contract, until decree the contract continues to exist, and the plaintiff still has the choice of affirming it or else proceeding to decree, which would destroy it forever.[23]

DIVISIBILITY OF FIRE INSURANCE POLICIES.—It is a general rule that the severability of ordinary contracts, depending as it does upon the intentions of the parties[1] as gathered from the language used and from the nature of the subject matter,[2] is determined solely by the unity of the consideration or its apportionment to separate items, whether this is express or implied in law, irrespective of the number and variety of the items embraced in the subject matter.[3] The question, however, is presented in a peculiar and interesting form when the courts are called upon to decide whether an insurance policy is rendered void *in toto* by the breach of a condition or warranty affecting part only of the property insured. It is not indeed in policies providing for a premium in gross and making no separate valuation of distinct subjects of risk, nor yet in cases where the premium is apportioned to the different items at a separate valuation for each, that the difficulty arises. Clearly these contracts are entire and severable respectively.[4] The discussion may therefore be narrowed to the single case of a policy combining a distinct valuation of the separate classes of property with a premium in gross, a situation which often arises and which has been the occasion of much discussion and many varieties of judicial opinion.[5]

The fact that the premium is in gross is regarded in many jurisdictions as conclusive of the unity of the consideration, and therefore, in accordance with the general rule above stated, such policies are deemed entire contracts avoided *in toto* by any breach of condition or warranty.[6] But the consideration is not single and entire unless the parties so intended, and of this intention the gross premium is merely an indication. Accordingly, a large number of courts, following the leading New York case of *Merrill* v. *Agricultural Insurance Co.*,[7] emphasize the fact that the parties have placed a separate valuation on the various subjects of risk, and urge that since the part of the gross premium apportioned to each is easily ascertainable by means

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[22]It does not follow that beginning a suit in equity can never constitute an election. The filing of a suit for specific performance of a voidable contract would be a clear and unequivocal affirmance thereof.

[23]Cohoon *v.* Fisher (1896) 146 Ind. 583. This case contains an excellent discussion of the point. See also Brady *v.* Daly (1899) 175 U. S. 148.

[1]Hammon, Contracts, § 634.

[2]More *v.* Bonnet (1870) 40 Cal. 251; Pollak *v.* Brush Co. (1888) 128 U. S. 446.

[3]Wooten *v.* Walters (1892) 110 N. C. 251; Lucesco Oil Co. *v.* Brewer (1870) 66 Pa. St. 351.

[4]Fitzgerald *v.* Atlanta Home Ins. Co. (N. Y. 1901) 61 App. Div. 350.

[5]See 14 Harv. L. Rev. 301; 11 COLUMBIA LAW REVIEW 685.

[6]Friesmuth *v.* Agawam Ins. Co. (1852) 10 Cush. 587; Assoc. Fireman's Ins. Co. *v.* Assum (1853) 5 Md. 165; Plath *v.* Minn. Ins. Assoc. (1877) 23 Minn. 479; See Essex Bank *v.* Meriden Ins. Co. (1889) 57 Conn. 335.

[7](1878) 73 N. Y. 452.